No. 86-1723

In The
Supreme Court of the United States
October Term, 1986

LUANN K. WALSH,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS EXPRESS AND STATION EMPLOYEES: BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, UNION PACIFIC-LINES EAST SYSTEM BOARD OF ADJUSTMENT NO. 106.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRENDA J. COUNCIL
General Attorney
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-4928

MARK B. GOODWIN
(Counsel of Record)
Assistant General Solicitor
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5432
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

24 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eighth Circuit correctly found that an arbitrator had properly interpreted the terms of a particular collective bargaining agreement.

LIST OF PARTIES

The caption of the case contains the names of all parties.*

---

* An updated version of the statement required by Supreme Court Rule 28.1 is included in the attached Appendix.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
ARGUMENT	5
I. The Petition Satisfies None Of The Traditional Standards Governing Review On Certiorari.	5
II. The Case Below Was Correctly Decided.	7
CONCLUSION	11
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752 (3rd Cir. 1982), *cert. denied* 459 U.S. 828, 103 S.Ct. 63 (1983)	6
Airline Pilots Ass'n. Intern. v. Eastern Airlines, Inc., 632 F.2d 1321 (5th Cir. 1980)	6, 9
Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al. v. Kansas City Terminal Railway Company, 442 F. Supp. 1173 (W.D. Mo. 1977), *affirmed* 587 F.2d 903 (8th Cir. 1978), *cert. denied* 441 U.S. 907 (1979)	5
Brotherhood of Railroad Signalman v. Louisville and N.R. Co., 688 F.2d 535 (7th Cir. 1982)	7
Buckeye Cellulose v. District 65, Div. 19, Etc., 689 F.2d 629 (6th Cir. 1982)	7
Campo Machining Co. v. Local Lodge No. 1926, Etc., 536 F.2d 330 (10th Cir. 1976)	6
Diamond v. Terminal Railway Alabama State Docks, 421 F.2d 228 (5th Cir. 1979)	5
F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Etc., 629 F.2d 1204 (7th Cir. 1980), *cert. denied* 451 U.S. 937, 101 S.Ct. 2061 (1980)	6
International Union of Operating Engineers v. Shank Artukvich, 751 F.2d 364 (10th Cir. 1985)	7
Knox Porcelain Corp. v. Teamsters Local U. No. 519, 504 F. Supp. 284 (E.D. Tennessee 1980)	8
Local 1020 of the United Brotherhood of Carpenters and Joiners of America v. FMC Corporation, 658 F.2d 1285 (9th Cir. 1981)	6
Lynchberg Foundry Co. v. United Steelworkers of America, 404 F.2d 259 (4th Cir. 1968)	6, 9

TABLE OF AUTHORITIES—Continued

Page

Peter Cooper, Corp. v. United Electric, Radio, Etc., 472 F. Supp. 692 (E.D. Wisc. 1979) 8

Resilient Floor, Etc. v. Welco Mfg. Co., Inc., 542 F.2d 1029 (8th Cir. 1976) 7

Roy Stone Transfer v. Teamsters, Etc., Local Un. 22, 752 F.2d 949 (4th Cir. 1985) 7

Timken Company v. United Steelworkers of America, 492 F.2d 1178 (6th Cir. 1974) 6

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960) 8

Zeviar v. Local No. 2747, Airline, Etc., Employees, 733 F.2d 556 (8th Cir. 1984) 7, 10

STATUTES

45 U.S.C. § 153 First (i) 2, 3

45 U.S.C. § 153 Second 3

No. 86-1723

In The
Supreme Court of the United States
October Term, 1986

LUANN K. WALSH,
Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS EXPRESS AND STATION EMPLOYEES: BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS & FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, UNION PACIFIC-LINES EAST SYSTEM BOARD OF ADJUSTMENT NO. 106.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Union Pacific Railroad Company submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves the interpretation of a particular collective bargaining agreement. Petitioner, who was employed by Respondent as a file clerk, challenges the interpretation reached by an arbitrator jointly selected by the parties, which interpretation was ultimately sustained by the Court of Appeals for the Eighth Circuit.

On June 10, 1977, Petitioner requested a thirty (30) day leave of absence, which was granted on the condition that she submit to an examination by Respondent's physician if she wanted the leave extended beyond the initial thirty (30) day period. Petitioner did not return to work at the end of her thirty (30) day leave of absence, nor did she submit to an examination by Respondent's physician. Instead, Petitioner had a note delivered to Respondent by her personal physician stating that she should be granted medical leave for an additional sixty (60) days due to pregnancy. After two unsuccessful attempts by Respondent to obtain a detailed report from Petitioner's personal physician to support the request for a sixty (60) day extension of her leave, Petitioner's seniority and service were terminated for failure to return to work upon expiration of her leave of absence in violation of Rule 43 of the agreement governing Petitioner's terms and conditions of employment (hereinafter the "BRAC Agreement").

On April 19, 1978, a grievance was filed on Petitioner's behalf seeking reinstatement with back pay. Respondent denied the grievance, and Petitioner progressed appeals from that denial through the proper channels, as outlined in Section 3 First (i) of the Railway Labor Act,

45 U.S.C. § 153 First (i). Finally, it was agreed that Petitioner's grievance would be submitted to a Special Adjustment Board (Public Law Board) as permitted under Section 3 Second of the Railway Labor Act, 45 U.S.C. § 153 Second. On May 29, 1983, Public Law Board No. 3314 rendered Award No. 4 ordering reinstatement of Petitioner, seniority unimpaired, but without back pay or benefits. The Board found that neither Petitioner's nor Respondent's conduct was without fault. In its decision, the Board stated that:

> "The Board concurs with the Carrier's view that the Claimant had the responsibility to furnish the reasons for the requested medical leave of absence; and when the Chief Engineer wrote Dr. Taylor on July 14, 1977 that the Carrier's Medical Director wanted a detailed report of the reasons for granting an extension, the Claimant should have taken steps to see her doctor honored this request. The Claimant cannot put herself on leave or extend her leave by inference or assumption. The Claimant had to take positive measure to secure an extension of her existing leave. However, the only flaw in the record is that the Chief Engineer did not inform the Claimant that her physician was not complying with the Medical Director's request. While the Board admits it is difficult for a patient to get a doctor to comply with a third party's request, nevertheless, the Carrier should have put her on notice that her physician was not honoring a valid request." (Pet. App. 3).

The authorized representatives of Petitioner and Respondent adopted Award No. 4, and on July 18, 1983, Petitioner resumed her employment with Respondent.

On November 29, 1983, Petitioner filed a Complaint in the United States District Court for the District of Ne-

braska seeking recovery on two causes of action. In her second cause of action, Petitioner sought to have Award No. 4 of Public Law Board No. 3314 set aside and to obtain back pay. Respondent filed a Motion for Summary Judgment on Petitioner's second cause of action. Respondent sought summary judgment on the grounds that Award No. 4 was not subject to judicial review and that Award No. 4 drew its essence from the terms of the BRAC Agreement.

By Order dated January 25, 1985, the District Court denied Respondent's Motion for Summary Judgment and granted Petitioner summary judgment on the second cause of action to set aside Award No. 4. After dismissing Public Law Board No. 3314's findings of fact, the District Court went on to hold that:

> "... the Board erred in requiring the plaintiff to telepathically monitor her doctor's private correspondence." (Pet. App. 16).

On the basis of that holding, the District Court found that "the Board's decision does not follow logically from its findings of fact," and was thus unenforceable. Respondent's Motion to Reconsider said Order was denied by Order dated March 20, 1985. The District Court subsequently entered an Order awarding Petitioner the sum of $130,253.63 as back pay.

Respondent took an appeal from the District Court's Orders to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals held that the District Court had exceeded the scope of judicial review permitted under the Railway Labor Act in setting aside Award No. 4 of Public Law Board No. 3314, and stated:

> "The test 'is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of the contract.' *Brotherhood of Railway, Airline & Steamship Clerks v. Kansas City Terminal Railway,* 587 F.2d 903, 906-07 (8th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979) (quoting *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970))."

The majority went on to say that it could not "approve of the District Court's usurption of the authority vested by Congress in the Public Law Board." (Pet. App. 5).

The Court also held that Award No. 4 drew its essence from the particular collective bargaining agreement at issue. The Court therefore reversed the District Court and reinstated Award No. 4 of Public Law Board No. 3314.

ARGUMENT

I.

The Petition Satisfies None Of The Traditional Standards Governing Review On Certiorari.

A. According to Petitioner, the "key issue" raised by the petition is the scope of an arbitrator's discretion under a "particular collective bargaining agreement." (Pet. 11). That issue has no jurisprudential significance. As Petitioner recognizes, the Federal courts "have consistently held that the terms of each respective collective bargaining agreement . . . determine the latitude to be given

an arbitrator in fashioning an award'' under that agreement. (Pet. 12).

This Court has traditionally declined to resolve such issues of private contract interpretation. The reason, of course, is that such cases rarely, if ever, raise issues of broad applicability or public importance. This case is no exception. Petitioner does not seek to resolve a recurring problem or an issue that has affected anyone other than herself and her employer. Nor does she seek to correct a departure from established legal principles. Instead, Petitioner merely asks this Court to substitute its interpretation of a ''particular collective bargaining agreement'' for the interpretation of that agreement reached by both the Court of Appeals and the arbitrator jointly selected by the parties. A question of such limited jurisprudential importance does not warrant this Court's review.

B. The decision below is consistent with the decisions of every other Federal Court of Appeals that has addressed the issue of whether an arbitrator was free to exercise discretion in fashioning a remedy.[1] Petitioner is

---

[1] The extent of an arbitrator's authority has been addressed by numerous Courts of Appeals. See e.g., *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3rd Cir. 1982), *cert. denied* 459 U.S. 828, 103 S.Ct. 63 (1983); *Local 1020 of the United Brotherhood of Carpenters and Joiners of America v. FMC Corporation*, 658 F.2d 1285 (9th Cir. 1981); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Etc.*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied* 451 U.S. 937, 101 S.Ct. 2016 (1980); *Airline Pilots Ass'n, Intern. v. Eastern Airlines, Inc.*, 632 F.2d 1321 (5th Cir. 1980); *Campo Machining Co. v. Local Lodge No. 1926, Etc.*, 536 F.2d 330 (10th Cir. 1976); *Timken Company v. United Steelworkers of America*, 492 F.2d 1178 (6th Cir. 1974); and *Lynchberg Foundry Co. v. United Steelworkers of America*, 404 F.2d 259 (4th Cir. 1968).

flatly wrong in asserting that the decision below conflicts with recent decisions of other Courts of Appeals.[2] The cases cited by Petitioner in support of her assertion stand for the proposition that an arbitrator exceeds his authority in fashioning a remedy only if the collective bargaining agreement expressly forbids the arbitrator from exercising any discretion. The decision below is fully consistent with those cases because Public Law Board No. 3314 neither ignored any express provisions of the BRAC Agreement mandating a specific remedy or ignored any express provisions limiting its authority to fashion Award No. 4. Therefore, the conflict Petitioner alleges is illusory.[3]

II.

The Case Below Was Correctly Decided.

A Public Law Board's authority to formulate an appropriate remedy in cases such as the instant case has long been recognized by courts at every level of the Federal court system. This Court discussed the ability of an arbitrator to formulate an appropriate remedy in its de-

---

[2] *International Union of Operating Engineers v. Shank Artukvich*, 751 F.2d 364 (10th Cir. 1985); *Roy Stone Transfer v. Teamsters, Etc., Local Union 22*, 752 F.2d 949 (4th Cir. 1985); *Buckeye Cellulose v. District 65, Div. 19, Etc.*, 689 F.2d 629 (6th Cir. 1982); *Bro. of Railroad Signalman v. Louisville and N.R. Co.*, 688 F.2d 535 (7th Cir. 1982); and *Resilient Floor, Etc. v. Welco Mfg. Co., Inc.*, 542 F.2d 1029 (8th Cir. 1976).

[3] Petitioner implies that the Eighth Circuit's decision below is inconsistent with another recent decision of the same Court. (Pet. 13); See *Zeviar v. Local No. 2747, Airline, Etc., Employees*, 733 F.2d 556 (8th Cir. 1984). That suggestion is frivolous. The Eighth Circuit's denial of Petitioner's request for rehearing *en banc* conclusively undermines any suggestion of such a conflict.

cision in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960), which was relied upon by the majority in the Court of Appeals decision. The Court stated:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies." *Id.* at 597.

Thus, in two cases cited by Petitioner, the courts held that where the collective bargaining agreement contains no provisions as to remedies, the arbitrator is free to fashion his own remedy. *Knox Porcelain Corp. v. Teamsters Local U. No. 519*, 504 F. Supp. 284 (E. D. Tenn. 1980) and *Peter Cooper Corp. v. United Electric, Radio, Etc.*, 472 F. Supp. 692 (E. D. Wisc. 1979).

There is no provision in the BRAC Agreement specifically addressing a situation where the charges against an employee were found to be less than totally sustained because the employee was not *solely* responsible for his or her breach of the collective bargaining agreement. Further, there is no language evidencing a clear intent to deny a Public Law Board any latitude of judgment in formulating a remedy appropriate to the circumstance. Here, as in *Knox Porcelain* and *Peter Cooper*, the Public Law Board properly exercised its authority to interpret the particular collective bargaining agreement and to fashion an appropriate remedy.

There is no principle of law or element of the BRAC Agreement that bars an award of reinstatement without

back pay. Thus, in *Lynchberg Foundry Company v. United Steel Workers,* supra, the Fourth Circuit rejected the argument that an arbitrator had exceeded his authority in awarding reinstatement without back pay by stating:

> "This rigid interpretation of the arbitrator's scope of authority is not warranted and would be acceptable only if a contract expressly forbade the arbitrator to exercise any discretion in fashioning this award. . . The question of contract interpretation here is whether reinstatement with full pay represents the sole remedy for an employee who has suffered an injustice, or whether it merely marks the outer limits within which an arbitrator may fashion a remedy appropriate to the circumstances. In the absence of language evidencing a clear intent to deny the arbitrator any latitude of judgment, the arbitrator is the one to answer this question." *Id.* at 261.

The Fifth Circuit addressed the question in *Airline Pilots Ass'n., Intern. v. Eastern Airlines, Inc.,* supra. There, plaintiff sought to have a Public Law Board award vacated. The Public Law Board had issued an award ordering an employee reinstated, without back pay, for additional training. The Circuit Court reversed the lower court's decision vacating the Public Law Board's award in part. In doing so, the Circuit Court held that:

> "A wide variety of situations may arise, many of which may never have been considered by the draftsmen of the bargaining agreement. The instant case is an example of just such a situation. The training program had its faults; Aponte had his share of inadequacies. Faced with this setting, the Board fashioned a remedy which it considered appropriate: reinstatement without full benefits. There can be no doubt that the Board acted within the ambit of its authority. Consequently, we may look no further." *Id.* at 1324.

The Eighth Circuit addressed the question of whether a Public Law Board had authority to exercise its discretion in formulating a remedy in *Zeviar v. Local No. 2747, Airline, Etc., Employees,* 733 F.2d 556 (8th Cir. 1984), which is cited by the majority of the Court as controlling the instant case. In *Zeviar,* the plaintiff was discharged for insubordination for refusing to take an assigned flight. The arbitration award plaintiff sought to have reviewed ordered her reinstated with partial back pay. The arbitrator based the award on his finding, as in this case, that neither party was completely blameless. On appeal, plaintiff argued, as does Petitioner in this case, that partial exoneration required, under the terms of the collective bargaining agreement, reinstatement with back pay. In rejecting that argument, the Circuit Court held:

> "In our view, the award did not exceed the scope of the Board's authority. Although the chairman found no insubordination, he did not consider Zeviar to be fully exonerated in the sense of bearing no responsibility for her discharge and lost wages. In the absence of full exoneration, section 21.C.2 does not require an award of full back pay. Thus the Board had authority to exercise its discretion in formulating a remedy, and the award drew its essence from the collective bargaining agreement." *Id.* at 559.

In sum, it is clear that the majority in the Court of Appeals decision was correct in its holding that Public Law Board No. 3314 had authority to exercise its discretion in formulating a remedy in this case, and that the award drew its essence from the collective bargaining agreement. Therefore, the petition for certiorari must be denied.

———o———

CONCLUSION

WHEREFORE, Respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

BRENDA J. COUNCIL
General Attorney
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-4928

MARK B. GOODWIN
(Counsel of Record)
Assistant General Solicitor
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5432

Attorneys for Respondent

APPENDIX

STATEMENT REQUIRED BY RULE 28.1

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of the Union Pacific Corporation, a publicly traded holding company. Union Pacific Railroad Company's subsidiaries and affiliates are as follows:

Alameda Belt Line
Alton & Southern Railway Company
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Automated Monitoring & Control International, Inc.
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
CMT Ltd.
Calnev Pipe Line Company
Camas Prairie Railroad Company
Central California Traction Company
Champlin Alaska Pipeline, Inc.
Champlin Arguello Pipeline, Inc.
Champlin Canada, Ltd.
Champlin Gas Gathering, Inc.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Liquid Pipeline, Inc.
Champlin Marketing, Inc.
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Refining, Inc.
Champlin Trading Company

Chicago & Western Railroad Company
Chicago Heights Terminal Transfer
Railroad Company
Delta Finance Company, Ltd.
Denver Union Terminal Railway
Des Chutes Railroad Company
Doniphan, Kensett & Searcy Railroad
Elk Mountain Coal Company
Esperanza Pipeline Company
Galveston, Houston and Henderson
Railway Company
Great Southwest Railroad, Inc.
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
MKT Exploration Company
MP Equipment Corporation
MP Redevelopment Corporation
Missouri Improvement Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Corporation
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Railroad Company
Missouri Pacific Truck Lines, Inc.
Mount Hood Railway Company
Nueces Pipeline, Inc.
Oakland Terminal Railway
Ogden Union Railway & Depot Company
Oregon Short Line Railroad Company
Oregon-Washington Railroad
& Navigation Company
Overthrust Pipe Line, Inc.
Pacific Subsidiary, Inc.
Pacific Rail System, Inc.
Panola Pipe Line, Inc.

Park Spring, Inc.
Penn Central Corporation
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Pueblo Union Depot and Railroad Company
Quality Aggregate Company
R M Leasing Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Sacramento Northern Railway
Southern Illinois and Missouri Bridge Company
Spokane International Railroad Company
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Standard Realty and Development Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas & Missouri Pacific Railroad Company
Texas City Terminal Railway Company
Tidewater Southern Railway Company
Trailer Train Company
UP Leasing Corporation
UP Sub, Inc.
Union Pacific Finance N.V.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Resources Corporation
Union Pacific Resources, Ltd.
Unita Development Company
Upland Industries Corporation
Upland Industrial Development Company
Wamsutter Pipeline, Inc.
Wasatch Insurance Limited

Weatherford Mineral Wells and Northwestern Railway Company
Western Pacific Railroad Company
Winton Coal Company
Yakima Valley Transportation Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LUANN K. WALSH,	)	
	)	
Plaintiff,	)	
	)	CV 83-0-806
vs.	)	
	)	ORDER
UNION PACIFIC	)	
RAILROAD COMPANY,	)	(Filed Mar. 20, 1985)
et al.,	)	
	)	
Defendants.	)	

This matter is before the Court upon defendant Carrier's motion to reconsider (filing 56) this Court's order (filing 52) entered on January 25, 1985, granting in part the plaintiff's and BRAC's System Board 106's motions for summary judgment (filings 29 and 31). The Court, being fully advised in the premises, finds that the Carrier's motion should be denied.

In filing 52, the Court held that the decision of Public Law Board No. 3314's award no. 4, which reinstated the plaintiff as the Carrier's employee but denied her claim for back pay, failed to draw its essence from the bargaining agreement. *Walsh v. Union Pacific Railroad*, No. CV 83-0-806, Order at 5-6 *citing Lynchberg Foundry Co. v. United Steelworkers of America*, 404 F.2d 259 (4th Cir. 1968) and *Epple v. Union Pacific Railroad*, 558 F. Supp. 63 (D. Colo. 1983). In this the Carrier contends the Court erred citing *Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees, IBT*, 733 F.2d 556 (8th Cir. 1984).

In *Zeviar,* the Eighth Circuit, relying in part on *Lynchberg* and *Epple* declined to award full back pay to an employee who had been accused of insubordination. *See Zeviar,* 733 F.2d at 558. In doing so, the *Zeviar* court specifically observed that:

> although the chairman [of the Labor Board] found no insubordination, he did not consider Zeviar to be fully exonerated in the sense of bearing no responsibility for her discharge and lost wages. In the absence of full exoneration, section 21.C.2 does not require an award of full back pay.

Zeviar, 733 F.2d at 559. In *Zeviar* the flight attendant, after being reprimanded, refused to fly, therefore failing to mitigate her actions. This wrongful act was the basis of the Court's refusal to award complete back pay.

This Court is compelled to distinguish *Zeviar* for the same reason it distinguished *Lynchberg* and *Epple* in its earlier decision. *See Walsh,* No. CV 83-0-806 at 5-6.

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the aribtrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); *International Brotherhood of Electrical Workers Local Union No. 53 v. Sho-Me Power Corp.,* 715 F.2d 1322, 1325 n.1 (8th Cir. 1983); *Lackawanna Leather Co. v. United Food & Commercial Workers International Union,* 706 F.2d 228, 230 (8th Cir. 1983).

In the present case, as the Court noted previously, it would have been impossible for the plaintiff to correct a situation that she was not aware of. Because her conduct was not culpable to any degree, *Zavier*, 733 F.2d at 558 (employee accused of insubordination temporarily leaves job); *Lynchberg*, 404 F.2d at 259 (employee falsified business records); and *Epple*, 550 F. Supp. at 63 (employee vandalized company property), are simply inapposite.

Accordingly,

IT IS ORDERED that defendant Carrier's motion for reconsideration (filing 56) is denied.[1]

DATED this 20th day of March, 1985.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

---

[1] The Carrier also argues that this Court erred in not granting its motion for summary judgment on the issue of conspiracy as set forth in plaintiff's first claim for relief. The Court does not necessarily agree with the footnote set forth in defendant BRAC System Board 106's brief in opposition to the Carrier's motion to reconsider (at p.2), which argues that the issue of conspiracy is now moot. The Court does, however, choose to exercise its discretion and again decline to grant the Carrier's motion for summary judgment on the question of conspiracy. Even if the district court is convinced that the moving party is entitled to judgment, the exercise of sound judicial discretion may dictate that the motion should be denied, in order that the case can be fully developed at a later date. McLain v. Meier, 612 F.2d 349, 356 (8th Cir. 1977).